Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 30, 2017

TO: Honorable Councilmember Georgette Gomez

FROM: City Attorney

SUBJECT: Marijuana Billboard Restrictions

INTRODUCTION

On November 8, 2016, the voters in California passed Proposition 64, known as the Adult Use of Marijuana Act (AUMA). The AUMA legalized certain non-medical marijuana activities for adults age 21 and older. You have asked whether the City may enact an ordinance restricting advertising of marijuana and marijuana products (collectively, "marijuana") in a manner similar to the alcohol advertising restrictions in San Diego Municipal Code (Municipal Code) Chapter 5, Article 8, Division 5.[1] (Attachment A).

QUESTION PRESENTED

May the City prohibit billboards advertising marijuana within a specified distance of or clearly visible from a school, playground, recreation center, child care facility or library?

SHORT ANSWER

Yes, if the ordinance restricting marijuana advertising on billboards does not conflict with existing state law, and complies with established First Amendment standards.

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[1] Municipal Code section 58.0503 prohibits advertising alcoholic beverages on a billboard within 500 feet of a school, playground, recreation center, child care center, library, or in a location where the billboard face and its advertisement are clearly visible from one of these locations.

ANALYSIS

I. PREEMPTION AND THE ADULT USE OF MARIJUANA ACT

The AUMA sets forth restrictions and regulations on non-medical marijuana advertising and marketing. (Attachment B). Specifically, the AUMA prohibits advertising marijuana on a billboard or similar device "located on an Interstate Highway or State Highway which crosses the border of any other state;" [2] advertising marijuana "in a manner intended to encourage persons under 21 years to consume marijuana or marijuana products;" and advertising marijuana "on an advertising sign within 1,000 feet of a day care center, school providing instruction in kindergarten or any grades 1 through 12, playground or youth center."[3] Cal. Business & Professions Code (Business & Professions Code) § 26152(d) – (g). "Day care center" is defined as "any child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and schoolage child care centers." Business & Professions Code § 26001(g) (citing Cal. Health & Safety Code (Health & Safety Code) § 1596.76). "Youth center" is defined as "any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities." Business & Professions Code § 26001(ee) (citing Health & Safety Code § 11353.1(e)(2)).

A. Legal Principles of State Law Preemption

Local ordinances in furtherance of public health, safety, morals and general welfare, or for preventing a public nuisance are traditional areas of local police power. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *City of Oakland v. Williams*, 15 Cal. 2d 542, 549 (1940). However, in light of the existing state regulations on marijuana advertising, any local ordinance must be carefully examined to avoid a preemption challenge.

Generally, a city may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. A conflict with general laws (state law) exists if a local law "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168 (2009) (citing *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1242 (2007)). An area has been fully occupied by state law when "the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent." *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006).

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[2] Assembly Bill 64 would expand the interstate highway and state highway restrictions to include all interstate or state highways. Cal. Assembly Bill 64 (2017-2018) Reg. Sess. (December 12, 2016).

[3] Assembly Bill 729 would expand this list to include a church. Cal. Assembly Bill 729 (2017-2018) Reg. Sess. (February 15, 2017).

B. An Ordinance Further Regulating Billboards Advertising Marijuana is Likely Not Preempted by the AUMA

An ordinance supplementing state law restrictions on marijuana advertising would likely not be held preempted if challenged in court. However, an ordinance providing advertising rules which are less restrictive than state law would likely be preempted by the AUMA.

1. Duplication and Conflict Preemption

Expanding the AUMA restrictions on marijuana advertising to include a greater distance requirement or an expanded list of locations would not duplicate or conflict with the AUMA's marijuana advertising restrictions. "A local ordinance *duplicates* state law when it is 'coextensive' with state law." *O'Connell v. City of Stockton (O'Connell)*, 41 Cal. 4th 1061, 1067 (2007) (citing *Sherwin–Williams Co. v. City of Los Angeles (Sherwin-Williams)*, 4 Cal. 4th 893, 897-98 (1993)). For example, duplication has been found where a local law "purported to impose the same criminal prohibition that general law imposed." *Gonzales v. City of San* Jose, 125 Cal. App. 4th 1127, 1135 (2004) (citing *In re Portnoy*, 21 Cal. 2d 237, 240 (1942)).

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law." *O'Connell*, 41 Cal. 4th at 1068 (emphasis in original). A conflict may be found where a local ordinance mandates something prohibited by state law, or prohibits something mandated by state law. *Browne v. County of Tehama*, 213 Cal. App. 4th 704, 721 (2013). When an ordinance does neither, it is not inimical to state law. *Sherwin–Williams*, 4 Cal. 4th at 902.

An ordinance regulating billboards advertising marijuana must supplement state law restrictions, rather than duplicate them. For example, local regulations could contain a greater distance requirement or expand the list of prohibited locations.[4] With restrictions of this nature, advertising within 1,000 feet of a location prohibited by the AUMA would not be mandated, and nothing mandated by state law would be prohibited. Likewise, simultaneous compliance with both sets of laws would be possible under additional, more restrictive regulations.[5] Finally, the AUMA imposes only administrative licensing consequences for violation of the advertising restrictions. *See* Business & Professions Code §§ 26030 – 26037. The Municipal Code, in contrast, may be enforced in a variety of ways, including criminal, civil, and administrative proceedings. *See generally* SDMC §§ 12.0201, 12.0202, 12.0204, 12.0301. Thus, neither the substantive provisions nor the enforcement remedies would likely be found duplicative of or contradictory to existing state law.

The existing 500-foot distance restriction on alcohol billboard advertising in Municipal Code section 58.0503 could not be applied to marijuana billboard advertising. A distance restriction less than the AUMA's 1,000-foot restriction would likely be viewed as conflicting with state

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[4] Although likely allowable under a preemption analysis, expanded regulations may raise significant First Amendment concerns due to the breadth of speech affected. *See* section III.B.4, *infra*.

[5] As used in this memorandum, a greater distance requirement or an expanded list of prohibited locations, would constitute more restrictive regulations, while a lesser distance requirement, such as only 500 feet, or a smaller list of prohibited locations, would constitute less restrictive regulations.

law, and thus, preempted. Such a restriction would "permit conduct which state law forbids." *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1124 (1997).

2. Field Preemption

The more complex question is whether the AUMA has occupied the field of marijuana advertising to the exclusion of local regulation. Indicia of the Legislature's intent to fully occupy a legal area include:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Kruse, 177 Cal. App. 4th at 1169 (citing *American Financial Services Assn. v. City of Oakland,* 34 Cal. 4th 1239, 1252 (2005)). Unless there is a "clear indication of legislative intent to preempt, courts presume that local regulation in areas of traditional local concern is not preempted by state law." *Conejo Wellness Center, Inc. v. City of Agoura Hills*, 214 Cal. App. 4th 1534, 1553 (2013). "Billboards have long been recognized as a proper subject for local regulation." *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 237 (2006).

The AUMA does not contain an express statement of preemptive intent regarding marijuana advertising. Regulations in the AUMA cover a variety of advertising-related topics, including: identification of the licensee, ensuring an adult audience, age verification for direct communication, false advertising, consistency with product labeling, billboard and sign restrictions, marketing to minors under age 21, and free product promotions. *See* Business & Professions Code §§ 26150 – 26155. It is possible a court may view the breadth of these regulations as evidence of intent to occupy the field of marijuana advertising regulation.

However, read in light of the entire AUMA, two factors suggest the drafters did not intend to fully occupy the field of marijuana advertising. First, the AUMA advertising restrictions apply to marijuana businesses with a state license. *Id.* Business and Professions Code section 26200(a)

states "[n]othing in this division shall be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division. . . ." Additionally, Business and Professions Code section 26201 expressly states:

> Any standards, requirements, and regulations regarding health and safety, environmental protection, testing, security, food safety, and worker protections established by the state shall be the minimum standards for all licensees under this division statewide. A local jurisdiction may establish additional standards, requirements, and regulations.

Thus, to the extent an ordinance regulates marijuana businesses licensed under state law, and addresses the health and safety of those whom the ordinance is meant to protect, there is express authorization for such regulation.

Marijuana billboard restrictions similar to the existing alcohol billboard ordinance would apply more broadly than the restrictions in the AUMA because they would apply to all marijuana advertising, not only advertising by a licensed business. The AUMA is silent on advertising restrictions for non-licensees.[6] Thus, nothing in the AUMA indicates an intent to occupy the field of all marijuana advertising.

Second, the AUMA drafters did expressly indicate preemptive intent where they so desired. In describing lawful personal marijuana use activities, Health and Safety Code section 11362.1(a) specifically states "it shall be lawful under state and local law, and shall not be a violation of state or local law. . . ." Likewise, Health and Safety Code section 11362.2(b)(2) declares "no city, county, or city and county may completely prohibit" personal indoor marijuana cultivation. Finally, Business and Professions Code section 26012(a), explains that issuance of statewide licenses is "a matter of statewide concern." These examples illustrate marijuana-related subject matters where the AUMA clearly precludes local regulation.

In the absence of such clear intent regarding advertising, and in light of the broad grant of local control in the AUMA, a court would be unlikely to find the field of marijuana advertising fully preempted by state law.

II. PREEMPTION AND THE MEDICAL CANNABIS REGULATION AND SAFETY ACT

In 2015, the state adopted the Medical Cannabis Regulation and Safety Act (MCRSA), designed to establish a statewide licensing system and regulations for medical marijuana businesses. *See generally* Business & Professions Code §§ 19300 – 19360. The MCRSA does not contain

[6] Assembly Bill 64 would apply the marijuana advertising restrictions to all advertising, regardless of whether an entity is licensed under state law. Cal. Assembly Bill 64 (2017-2018) Reg. Sess. (December 12, 2016), § 8, Business & Profession Code § 26152.

medical marijuana advertising restrictions. Thus, a preemption challenge to a medical marijuana billboard ordinance is unlikely. Even if such a challenge was made, the MCRSA contains anti-preemption, local control provisions similar to the AUMA, and the City would likely prevail. *See* Business & Professions Code §§ 19315, 19316; Health & Safety Code § 11362.83.[7]

III. THE FIRST AMENDMENT AND COMMERCIAL SPEECH

Even if a local ordinance restricting marijuana billboard advertising is not preempted by state law, regulation of advertising also raises constitutional issues. The First Amendment to the United States Constitution declares that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. These provisions are applicable to actions of the states and cities through the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1; *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The California Constitution also protects the right of every person to "freely speak . . . his or her sentiments on all subjects" and provides that no law may "restrain or abridge liberty of speech or press." Cal. Const. art. I, § 2. The California Constitution and the case law construing it give greater protection to the expression of free speech than the United States Constitution. *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1025 (2002) (quoting *Gonzales v. Superior Court*, 180 Cal. App. 3d 1116, 1122 (1986)). The free speech rights guaranteed by the federal and state constitutions will be referred to collectively as "First Amendment" rights.

A. Commercial Speech Doctrine

Speech advertising a product for sale, and proposing a commercial transaction, has been given a basic level of First Amendment protection by the courts, and restrictions on advertising are typically analyzed under the commercial speech doctrine. *Lorillard Tobacco Co. v. Reilly (Lorillard),* 533 U.S. 525, 553-54 (2001). Commercial speech is defined as "speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation. . . ." *Central Hudson Gas & Electric Corp., v. Public Service Comm'n of New York (Central Hudson)*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978)). Commercial speech has also been described as that where the "advertiser's interest is a purely economic one." *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

Central Hudson established a four-part test for analyzing regulations of commercial speech:

[7] Assembly Bill 64 would apply the same advertising restrictions to the MCRSA. Cal. Assembly Bill 64 at § 5, Business & Professions Code § 19349. In that case, a similar analysis would likely apply.

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. The California Supreme Court has also recognized the commercial speech doctrine and accepted *Central Hudson* as the controlling analysis for commercial speech regulation under the California constitution. *Kasky v. Nike, Inc.,* 27 Cal. 4th 939, 969 (2002).

Government regulations of speech based on the content of the speech or the identity of the speaker are traditionally subject to heavier scrutiny than content neutral regulations. *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 566 (2011). The same is true for content based regulation of commercial speech. *Id.* In order to justify a content based regulation of commercial speech, the government must "show at least that the statute directly advances a substantial governmental interest and that measure is drawn to achieve that interest." *Id.* at 572.[8]

B. Analysis of Marijuana Billboard Advertising Restrictions

No court has yet analyzed restrictions on marijuana billboard advertising. However, an ordinance establishing distance requirements from certain locations for billboards advertising marijuana may be evaluated using the *Central Hudson* and *Sorrell* tests.

1. Is marijuana advertising protected by the First Amendment?

In order to receive First Amendment protection, marijuana advertising must concern lawful activity and must not be misleading. *Central Hudson*, 447 U.S. at 566. Under California law certain marijuana related activities are now legal for adults age 21 or older. Cal. Health & Safety § 11362.1. Conversely, under federal law, marijuana is still a scheduled controlled substance and marijuana-related activities are illegal. *See generally* 21 U.S.C. §§ 841(a), 844(a). It is unclear how a court, either state or federal, would rule on this issue, where the sale and purchase of marijuana advertised on billboards is legal under state law but illegal under federal law.

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[8] In 2015, the United States Supreme Court held that content based speech regulations, even if viewpoint neutral, were subject to traditional strict scrutiny, meaning the law must be narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz.,* 576 U.S. ____, 135 S. Ct. 2218, 2226 (2015). *Reed* was not a commercial speech case, and did not reference the *Central Hudson* or *Sorrell* tests for commercial speech. At least two courts have held that *Reed* and traditional strict scrutiny do not apply to the commercial speech analysis. *Lamar Central Outdoor, LLC v. City of Los Angeles*, 245 Cal. App.4th 610, 625 (2016); *California Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346 at *10 (C.D. Cal. July 9, 2015).

2. The City must have a substantial government interest in restricting the location of billboards advertising marijuana.

In developing a marijuana billboard ordinance, the City Council (Council) must identify the interests to be advanced by the regulation. An ordinance restricting marijuana billboards within a certain distance of or viewable from places frequented by children may be based on the City's presumed interest in preventing marijuana use by children. Such an interest has been upheld in the contexts of alcohol and tobacco advertising restrictions. *Lorillard*, 533 U.S. at 561; *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996). It is likely a court would find a significant government interest in preventing marijuana use by children, but any ordinance would need to be supported by data and legislative findings regarding the negative effects of marijuana use by children and, if available, the impact of marijuana advertising on such use. Research from Colorado regarding youth marijuana use since legalization, for example, may help establish the City's substantial government interest in preventing underage marijuana use.

Additionally, the Council should carefully examine whether the interests to be served by a proposed ordinance are already adequately protected by the marijuana advertising restrictions in state law, particularly given the broad definition of "youth center" and the AB 729 proposal to include churches in the list of prohibited locations. Any additional interests to be protected should be clearly identified and explained. If the City's interests are found to be already protected by state law, the ordinance may be open to a legal challenge on this prong of the *Central Hudson* analysis.

3. A marijuana billboard advertising restriction must directly advance San Diego's substantial government interest.

To ensure that a marijuana billboard restriction directly advances the City's interest, the ordinance would need to be based on facts linking visible advertising to increased marijuana use by children. It is unclear whether such information or studies exist, given the very recent passage of the AUMA. Similar data analyzing the relationship between alcohol or tobacco advertising and underage usage may be helpful and may provide a reasonable analogy to children and marijuana advertising. *See Lorillard*, 533 U.S. at 555. In developing such data, the Council should carefully consider how each proposed restriction advances a particular interest.

4. A marijuana billboard advertising restriction must not be more extensive than necessary to achieve the City's interest.

The fourth prong of the *Central Hudson* test has also been described as requiring a "reasonable fit between the means and ends of the regulatory scheme," not necessarily the least restrictive means of achieving the government interest. *Lorillard*, 533 U.S. at 556, 561. When the Council adopted the alcohol billboard restrictions in 2000, it gathered evidence that "more than half of the existing billboards are within one thousand feet of schools, playgrounds, recreation centers or facilities, child care centers, arcades. . . ." (San Diego Ordinance O-18879 (November 14,

2000)).[9] The Council also made findings regarding the number of billboards which would still be available for alcohol advertising despite the restrictions. *Id.* Updated, similar information regarding the City's existing billboards, and the impact of the restrictions, would be necessary to support such an ordinance and to illustrate that the restrictions are not more extensive than necessary to achieve the City's interests.

The City's alcohol billboard restrictions, contained in Municipal Code sections 58.0501 – 58.0504, were challenged in 2001. *Clear Channel Outdoor, Inc., et.al. v. City of San Diego,* 01 CV 1941 BTM (POR) (2001). The parties successfully settled the lawsuit and amended the ordinance to its current form. *See* San Diego Ordinance O-19173 (May 6, 2003).
However, not all billboard distance restrictions have survived legal challenge. In *Lorillard*, a state regulation prohibited tobacco advertising on billboards and other mediums within 1,000 feet of schools and playgrounds. *Lorillard,* 533 U.S. at 534-35. The Court noted evidence in the record showing that "the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts," and concluded that the "uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring." *Id.* at 562-63. Recognizing that although some restrictions on commercial speech may be justifiable, the Court reasoned that tobacco use is a legal adult activity, and "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 565.[10] The same analysis could be applied to adult marijuana use in California in light of Proposition 64.

Alcohol billboard restrictions have been challenged on similar grounds. In *Eller Media Co. v. City of Cleveland, Ohio*, 161 F. Supp. 2d 796 (N.D. Ohio, August 10, 2001), the court struck down an ordinance prohibiting alcohol advertising in any public place based on the reasoning in *Lorillard*, finding that it was "nearly a complete ban on the communication of truthful information about legal alcoholic products to adult consumers." *Id.* at 811. In contrast, an alcohol billboard ordinance challenged by the same plaintiff was upheld in *Eller Media Co. v. City of Oakland*, 2000 WL 33376585 (N.D. Cal., December 7, 2000). At issue in that case was an ordinance prohibiting signs advertising alcohol within "1000 feet of schools, city-owned youth-recreation centers, licensed child-care facilities, places of worship," or a particular local field. *Id.* at *1. Applying the *Central Hudson* test, the court found 1,000 feet to be a reasonable fit for achieving the city's interest in reducing underage drinking. *Id.* at 5, 9. The court noted that the ordinance was not a complete ban on alcohol advertising, but rather a "time, place, and manner" restriction, leaving "plenty of fora" (i.e. places) for alcohol advertising. *Id.* at 1, 9.

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[9] This distance requirement and the list of locations was subsequently amended in 2003 to restrict alcohol advertising on billboards only within 500 feet of a restricted location, and arcades were removed from the list of locations. These amendments were a result of litigation challenging the ordinance. (San Diego Ordinance O-19173 (May 6, 2003)).

[10] In 2015, the City repealed tobacco advertising restrictions within 1,000 feet of a school, playground, recreation center or facility, child care center, arcade, or library based on the reasoning in the *Lorillard* case. Those regulations also contained other outdoor advertising rules and a zoning requirement, and were broader than the existing alcohol billboard restrictions. *See* San Diego Ordinance O-20554 (August 7, 2015); City Att'y MOL No. 2015-6 (April 10, 2015).

If the Council wishes to develop an ordinance restricting billboards advertising marijuana, it should carefully tailor the ordinance to only those restrictions which directly advance San Diego's interests not adequately addressed by state law. The Council should also carefully tailor the ordinance to restrict no more speech than necessary, keeping in mind the City's recent repeal of tobacco advertising restrictions.

CONCLUSION

Although local marijuana advertising regulation is a new and untested area of law, the Council likely may enact an ordinance not in conflict with the advertising restrictions in the AUMA. However, it is also prudent to wait until the relevant pending bills in the state legislature are resolved to determine what impact, if any, each of them would have on a proposed ordinance. As currently drafted, Assembly Bills 64 and 729 would expand the scope of the advertising regulations in the AUMA. The final content of these bills, if adopted, would need to be evaluated for any impact on the preemption and First Amendment analyses contained in this memorandum. Additionally, any ordinance must be based on a developed factual record fully illustrating the City's interest in marijuana advertising restrictions, explaining how the restrictions advance the interest, and should restrict no more speech than necessary to serve the interest.

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By /s/ Michelle A. Garland
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Attachments